Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1979

No. 79-572

ANTHONY MICHAEL CARLONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

Supreme Court of the United States

October Term 1979

—o—

No. .....

—o—

ANTHONY MICHAEL CARLONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

The Petitioner, Anthony Michael Carlone, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit rendered in these proceedings on August 9, 1979.

Respectfully submitted,

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit, *United States of America v. Anthony Michael Carlone,* No. 79-1172, is not yet reported, and is attached hereto as appendix "A".

JURISDICTION OF SUPREME COURT

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 9, 1979.

A Petition for rehearing was filed with the United States Court of Appeals for the Eighth Circuit, and was denied by Order dated September 6, 1979.

This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254.

Jurisdiction of the United States Court of Appeals for the Eighth Circuit was invoked pursuant to 28 U. S. C. § 1391.

QUESTION PRESENTED FOR REVIEW

Was the petitioner denied due process of law by the lower Court's failure to order a new trial based upon newly discovered evidence of governmental corruption in the truth finding process?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service of war or public danger; nor shall any person be subject to punishment for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

———o———

STATEMENT OF THE CASE

The petitioner, Anthony Michael Carlone, seeks relief from this Court from affirmance from his conviction of three counts of assaulting federal officers, contrary to 18 U. S. C. § 111 and § 1114.

The events which form the basis for petitioner's conviction took place on August 14th and August 16th, 1978, at a time when petitioner was under surveillance by agents of the Federal Bureau of Investigation. Regarding August 14th, government evidence showed that an unmarked government vehicle, driven by two FBI agents, was driven slowly past petitioner's house on a couple of occasions. Subsequently, the petitioner followed the agents for a short period of time, and when the agents drove by peti-

tioner's house at a later time he ran after them, yelling and asking them who they were. Petitioner then entered his vehicle and followed the agents, with the agents testifying that petitioner followed them at a high rate of speed, swerving his vehicle toward the agents' car and that in order to avoid being hit, the agents had to brake sharply and swerve, causing their vehicle to leave the road.

Surveillance was conducted again by FBI agents on August 16th. The third time the agents passed in front of his home on this occasion, petitioner placed himself in the middle of the street and the agents therefore stopped their vehicle. The agents testified that petitioner yelled as he approached the government vehicle, opened the driver's door and threatened the driver with a hammer which he had been using earlier, and continued to yell at the agents. They also testified that when the passenger got out of the government vehicle, petitioner ran around the car, and confronted that agent with the hammer as well, putting it down only when warned to do so by the agent.

Contrary to the government's evidence, petitioner testified as to his version of the two encounters with the FBI agents, essentially denying that any assault took place on either occasion. Basically, his testimony was that he did not cause the agents' car to swerve to avoid a collision, that he never displayed the hammer in an assaultive manner, and that it was never his intention to harm or assault the agents, but merely to identify them and ascertain the reason for their presence. Obviously, therefore, the primary issue for the jury was one of credibility, and that issue was resolved in the government's favor.

Subsequent to petitioner's conviction, a motion for a new trial based on newly discovered evidence was filed, based primarily on the contents of an affidavit submitted by William E. Sorg, brother-in-law of petitioner's brother Salvatore. In substance, Sorg maintained that he was in the employ of two FBI agents who did not testify at trial as a paid informant. His affidavit states that he was asked by these agents to "plant" weapons on petitioner, "plant" narcotics on petitioner, and that the FBI was conducting surveillance of petitioner, knowing that he had a quick temper and hoping that they (the FBI) could provoke him into behavior which would permit his arrest.

Sorg's allegations were denied by the agents accused of making them, but the agents who testified at trial did not submit responsive affidavits. Based upon the submissions which were made, the trial court denied petitioner's motion for a new trial; this decision was affirmed by the Court of Appeals.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. Petitioner was denied due process of law and a fair trial by reason of governmental corruption of the truth finding process, not discovered until after the trial, and fundamental fairness mandates that he receive a new trial.

This is not the usual type of case in which government misconduct, most often by the use of known or unknown perjured testimony, has infected the proceedings which results in conviction. See, e. g., *Napue v. Illinois,* 350 U. S. 264 (1959); *Giglio v. United States,* 405 U. S. 150

1972); *United States v. Agurs*, 427 U. S 97 (1976). The type of conduct alleged herein is unusual, for it is governmental misconduct of the most serious kind—conduct which tears at the very heart of the American system of criminal justice—evidence of a continuous pattern of behavior on the part of the FBI calculated to "set up" petitioner for prosecution, and their concomitant resort to illegal means and fabrication in order to accomplish their goal. The allegations of this type of misconduct have never been aired before a jury, however, because they were not discovered until after petitioner's trial and because his motion for a new trial based upon that evidence was denied. It is petitioner's contention that the Court of Appeals' ruling in the instant case is in conflict with the doctrine developed in the cases cited above, and therefore this Court should grant certiorari to correct that decision.

Prosecutorial misconduct is an issue which has received the attention of this Court in a long series of cases. See, e. g., *Mooney v. Holohan*, 294 U. S. 103, 112 (1935); *Napue v. Illinois*, supra, 360 U. S. at 269; *Brady v. Maryland*, 373 U. S. 83, 87 (1963). In accordance with the constitutional doctrine developed in these cases, it is clear that nondisclosure of material evidence affecting credibility, where the reliability of a given witness may well be determinative of guilt or innocence, requires a new trial where such nondisclosure is attributable to the government. *Giglio v. United States*, supra, 405 U. S. at 154. In the instant case, it is clear that the evidence which was suppressed by the government, through the alleged misconduct of its agents, was material, in that it had direct bearing upon the thrust of the defense, namely, that petitioner was being tried on "trumped-up" charges and that the testify-

ing FBI agents were not telling the truth. The evidence was directly relevant to the credibility of the testifying agents, in that it was evidence which tended to show a substantial reason for bias or prejudice on their part. See, e. g., *United States v. Peltier,* 585 F. 2d 314, 332 (8th Cir. 1978), cert. den. — U. S. —, 99 S. Ct. 1422.

The primary reason for the Court of Appeals' failure to grant petitioner a new trial is that Sorg's allegations were directed to FBI agents who did not testify at the trial.

> The newly discovered evidence in this case does not establish any specific claim that the FBI agents who testified at Carlone's trial perjured themselves, nor does it establish any specific claim of governmental corruption concerning Carlone's trial and the incidents involved therein. Slip op. at 9.

This finding is legally incorrect, however, for where prosecutoria misconduct such as governmental corruption of the truth-finding process is involved, all government agents involved in the prosecution are responsible for the knowledge and activities of other government agents. See, *Giglio v. United States,* supra, 405 U. S. at 154; *United States v. Runge,* 593 F. 2d 66, 73 (8th Cir. 1979); *Ray v. United States,* 588 F. 2d 601, 603 (8th Cir. 1978). Cf. Rule 801 (d) (2) (C), Federal Rules of Evidence.

Based upon the foregoing, it is petitioner's contention that the Court of Appeals applied the wrong legal standard in reaching its decision. The newly discovered evidence upon which petitioner sought a new trial was evidence of government misconduct in its worst form. Even though the misconduct evidence related to agents who did not testify at trial, it is clear under "government miscon-

duct" doctrine and principles of agency that the agents who did testify at trial were responsible for the conduct and statements of the former. Therefore, it is petitioner's contention that the Court of Appeals applied the wrong legal standard in reaching its conclusion, and should have applied that established in *United States v. Agurs,* supra, 427 U. S. at 112:

> (I)f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. (Fn. omitted.)

CONCLUSION

Based upon the foregoing, the petitioner respectfully requests that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A—Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1172

UNITED STATES OF AMERICA,

Appellee,

vs.

ANTHONY MICHAEL CARLONE,

Appellant.

Appeal from United States District Court for the District of Minnesota

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Submitted: June 11, 1979

Filed: August 9, 1979

Before HEANEY and STEPHENSON, Circuit Judges, and MARKEY,* Chief Judge.

STEPHENSON, Circuit Judge.

Appellant-defendant Anthony Michael Carlone appeals from his conviction[1] by jury of three counts of assault on a federal officer, 18 U. S. C. §§ 111 & 1114, pri-

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*The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

1 Carlone was sentenced to one year and one day.

marily contending that the district court[2] erred in denying his motion for a new trial based on newly discovered evidence. We affirm the district court.

On August 14 and 16, 1978, Carlone was under surveillance by the F. B. I. On August 14, Carlone was at his home and noticed a light blue vehicle being driven slowly past the house a couple of times. In the vehicle were Dag Sohlberg and Ben Patty, F. B. I. agents. Testimony at trial established that Carlone followed the agents for a short time in his vehicle; later the agents drove by Carlone's house again and Carlone ran after the car, yelling and asking the agents who they were. Carlone then jumped in his car and pursued the agents. The agents testified that Carlone followed them at a high rate of speed, swerving his vehicle toward the agents' car; the agents testified that in order to avoid being hit, it was necessary to brake their car and swerve, causing their car to leave the road. Carlone then apparently returned home.

On August 16, Sohlberg and agent Michael Neville resumed surveillance of Carlone's home and again drove by the house several times. The third time the car passed, Carlone placed himself in the street causing the agents to stop their car. The agents testified that Carlone yelled, approached the car, grabbed the door on the side of the car in which Sohlberg sat, raised a hammer Carlone had been using earlier, and yelled at the agents. Agent Neville testified that Neville then got out of the car and that Carlone ran around the car, confronting Neville with the hammer. Carlone only put the hammer down when faced

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2 The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota.

with a drawn gun and verbal admonitions from Neville. Sohlberg testified that Carlone, then unarmed, asked who Neville was and was informed that Neville was an F. B. I. agent.

Carlone's description of the confrontation was different than that of the agents, but the jury verdict indicates that the jury chose to believe the F. B. I. agents' testimony. Basically, Carlone testified that Carlone never displayed the hammer in an assaultive manner; that the hammer was in Carlone's pocket at all times—until one of the agents ordered him to remove it; that Carlone did not cause the agents' car to swerve to avoid a collision; and that it was never Carlone's intention to harm or assault the agents, but merely to identify them and the purpose for their presence.[3]

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3 Carlone concedes that the federal law enforcement identities of the agents are jurisdictional requirements only and that 18 U. S. C. § 111 only "requires * * * an intent to assault, not an intent to assault a federal officer." *United States v. Feola,* 420 U. S. 671, 684 (1975). Carlone does contend, however, that because unidentified agents' "conduct * * * might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property" and because the evidence here could show such an "honest mistake of fact [by Carlone] * * * not * * * consistent with criminal intent," there was not sufficient evidence to support the jury's verdicts. *Id.* at 686.

Carlone admits that the jury was properly instructed in regard to this matter. This court has carefully reviewed the transcript and concludes that there is sufficient evidence from which the jury could have concluded that Carlone intended to resort to immediate violence against the agents without justification; thus there was sufficient evidence from which the jury could conclude that Carlone had the criminal intent to do the acts specified in 18 U. S. C. § 111. *See United States v. Feola, supra.*

The primary basis for Carlone's motion for a new trial based on newly discovered evidence is the content of an affidavit submitted by William E. Sorg, brother-in-law of Carlone's brother Salvatore. In substance, Sorg maintains in his affidavit that two F. B. I. agents, Michael Hudak and David Keller, had employed Sorg as a paid informant for the F. B. I. Sorg states that he was asked to "plant" weapons on Carlone, plant narcotics on Carlone, and that the F. B. I. was doing a surveillance on Carlone "with the knowledge that Carlone had a quick temper and with the hope that * * * the F. B. I. * * * could provoke him into doing something that would ultimately allow an arrest." Sorg also stated that agent Hudak told Sorg that the F. B. I. "had been successful in getting Mr. Carlone on 'a trumped-up charge', but that it was something anyway." The only time frame referred to in the affidavit was that Sorg was employed as a paid informant for the F. B. I. "from approximately September of 1977 until the present time."[4]

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4 The strongest portion of the affidavit is as follows:

> William E. Sorg being duly sworn upon oath deposes and says that:
>
> * * *
>
> 8. He was requested on numerous occasions by Special Agent Hudiak to plant weapons on or in the property of Anthony Carlone without the knowledge or consent of Anthony Carlone.
>
> 9. He was requested on numerous occasions by Special Agent Hudiak to plant narcotics on or in the property of Anthony Carlone without the knowledge or consent of Anthony Carlone.

(Continued on the next page)

Agents Hudak and Keller admit in their affidavits that Sorg was a paid informant of the F. B. I., but basically deny the other statements Sorg attributes to them.

Joseph S. Friedberg, counsel for the defendant Carlone, states in his affidavit that he was not aware of the existence of William E. Sorg prior to the trial, nor was he aware of any of the information contained in Sorg's affidavit prior to trial. Friedberg states that the information was not discoverable by the use of due diligence prior to trial and that had such information been communicated to

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10. These requests were made to your affiant after his communication to the Federal Bureau of Investigation that he was unable to get Carlone to deal with him in any unlawful enterprise.

11. Your affiant was told by Special Agent Hudiak on a number of occasions that surveillance was being run on Anthony Carlone calculated to allow Mr. Carlone to be aware that he was under surveillance.

12. Special Agent Hudiak told your affiant that the Federal Bureau of Investigation was doing that surveillance with the knowledge that Carlone had a quick temper and with the hope that they, the FBI, could provoke him into doing something that would ultimately allow an arrest.

13. Special Agent Hudiak ultimately told your affiant that his agency had been successful in getting Mr. Carlone on 'a trumped-up charge', but that it was something anyway."

* * *

16. Special Agent Hudiak informed your affiant that Anthony Carlone was suspected of being the head of organized crime in Minnesota and that they would do and pay anything to get him. He stated that they would willingly resort to unlawful means to convict Anthony Carlone.

the jury during the trial, "it is probable that the jury would have reached a different verdict."

Carlone's first contention on appeal is that the trial court erred in using the standards set out in *United States v. Ward,* 544 F. 2d 975, 977 (8th Cir. 1976) as the test in considering the motion for the new trial based on newly discovered evidence. Carlone contends that the proper standard to be used for this set of facts is that set out in *United States v. Runge,* 593 F. 2d 66, 73 (8th Cir. 1979), a standard which places less of a burden on a defendant.

Carlone argues that had Sorg's statements been known at the time of trial, Carlone, who has maintained his innocence at all times by denying that he assaulted the agents, and who has, in essence, alleged that the charge on which he was brought to trial was a "trumped-up charge," would not have signed a stipulation which became part of the record. Carlone concedes in the stipulation that the F. B. I., at the time of the incidents, was surveilling Carlone "for lawful reasons." Carlone's rationale at the time of trial was that such stipulation would be less damaging to Carlone than would be the government's response to any defense that Carlone might raise which would involve a defense of harassment by the F. B. I. agents.[5]

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5 The following is the relevant conversation between the parties as to the stipulation:

> Mr. Vosepka [Assistant U. S. Attorney]: Your Honor, in addition we have the aspect of the legitimacy of the agents involved and the fact that the agents are involved in the course of their duties. It is my supposition that the defense may very well wish to suggest

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that they were not properly in performance of their duties. Since it is a jurisdictional requirement for us to show the legitimacy of the performance of their duties, it would therefore be necesasry to show, at least in general terms, what they were doing on that day and what the nature of the investigation was that they were involved in. I could anticipate, and that is why I wish to bring it up now, the possibility that the defense may have some objections to us being allowed to do that and I would like to discuss it now.

* * *

The Court: * * * What is your position with reference to what he brings up?

Mr. Meshbesher [Counsel for Defendant]: If he is going to ask the FBI if they are conducting an investigation for possible murder charges or heinous crimes, or any crime, I think it is improper because it is a mere investigation.

The Court: Are you willing to concede that they were in the performance of their official duties at or about the time alleged?

Mr. Meshbesher: I think we have to.

Mr. Friedberg [Counsel for Defendant]: Maybe you can tell us what it was they were investigating.

Mr. Vosepka: Interstate transportation of stolen property—interstate transportation of stolen property and mail and wire fraud.

Mr. Friedberg: That would be bad for that testimony to come out.

* * *

The Court: Is it enough for them to testify that they had Mr. Carlone under surveillance in connection with an investigation that they were conducting?

Mr. Vosepka: Yes, Your Honor, but I think it is necessary, at least to some extent, we have to develop the nature of their investigation because if we were to have the agent get up and baldly say, yes, we were in the

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Carlone now contends that had Sorg's statements been known prior to trial, Sorg's testimony could have been used to cast direct doubts on the credibility of the government's main witnesses, agents Sohlberg and Neville.[6] Because credibility was a significant issue in the case and because Carlone's defense was, in essence, that the charge was "trumped-up," there is a "reasonable likelihood" that the evidence would have affected the judgment of the jury. *See United States v. Runge, supra,* 593 F. 2d at 73.

We initially note that the standard for motions for a new trial based on newly discovered evidence as articulated in *Ward*:

> (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be

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> performance of our duty, that is totally rebuttable perhaps by what—
>
> The Court: Let's find out.
>
> Mr. Meshbesher: We wouldn't question that.
>
> The Court: Is that an issue in the case?
>
> Mr. Meshbesher: It won't be an issue.
>
> Mr. Vosepka: We would agree to stipulate that the agents were in the performance of their official duties and that then we could go on to the fact that they were surveilling Mr. Carlone as a portion of their official duties and official investigation. However I seek to elicit at this time if the Defense posture, either in cross-examination or in its case, would be that they were acting ultra vires in any way?"
>
> Mr. Meshbesher: Absolutely not because then we will open up the other area and you will walk in.

6 The government also presented other witnesses, *i. e.,* two individuals who were working at Carlone's home on August 14 on an alarm system.

> alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved, and (5) it must be of such nature that, on a new trial the newly discovered evidence would probably produce an acquittal.

United States v. Ward, supra, 544 F. 2d at 977 *quoting from United States v. McColgin,* 535 F. 2d 471, 476 (8th Cir.), *cert. denied,* 429 U. S. 853 (1976). This is not the same as the standard articulated in *United States v. Runge, supra.* In *Runge* we noted that:

> Unlike the stricter standard of materiality used in new trial motions based on discovery of new evidence or failure of the prosecution to disclose favorable evidence, knowing use of perjured testimony requires that a conviction be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

United States v. Runge, supra, 593 F. 2d at 73, *quoting from United States v. Agurs,* 427 U. S. 97, 103 (1976).

Assuming arguendo that the newly discovered evidence *might* affect the credibility of the agents' testimony, and consequently might have made Carlone's defense of harassment more believeable, leading him not to make the stipulation, such newly discovered evidence does not create a factual situation that falls within the *Runge* standard. The line of cases from which the *Runge* standard, adopted by this court, arose includes *United States v. Agurs,* 427 U. S. 97 (1976); *Giglio v. United States,* 405 U. S. 150 (1972); and *Napue v. Illinois,* 360 U. S. 264 (1959). These cases all involve specific instances of prosecutorial misconduct, such as the use of "known perjured

testimony," or other governmental corruption of the truth finding process resulting in a deprivation of fundamental due process. The newly discovered evidence in this case does not establish any specific claim that the F. B. I. agents who testified at Carlone's trial perjured themselves, nor does it establish any specific claim of governmental corruption concerning Carlone's trial and the incidents involved therein.

Thus, the trial court did not err in using the *Ward* standards considering the facts in this case. Further, we cannot say that the trial court erred in its determination that the possible effect on credibility was not of such a nature that, on a new trial, it would "probably produce an acquittal." *United States v. Ward, supra.* Finally, we cannot say that the trial court abused its discretion in denying the motion without an evidentiary hearing.[7] In this regard, we note that the newly discovered evidence also failed to hold up to other standards expressed in *Ward;* the trial court found (1) although the affidavit might arguably indicate that the evidence was newly discovered as to counsel for the defendant, there was no showing that the evidence was newly discovered as to the defendant personally; (2) nothing was alleged in the affidavit from which the trial court could infer diligence on the part of the defendant specifically or on the part of defendant's counsel in attempting to obtain the evidence; (3) the affidavit indicates no specificity as to time or place; and (4) further, the allegations are made against two

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7 *See generally United States v. Cardarella,* 588 F. 2d 1204 (8th Cir. 1978).

agents of the F. B. I., neither of whom was involved in the episode giving rise to this action and neither of whom testified at trial. Moreover, in regard to the issue of relevancy, the trial court found that even if the testimony of the agents involved in the newly discovered evidence was relevant, the probative value would be outweighed by the danger of confusion of the issues and misleading of the jury and hence, would not be admissible under Fed. R. Evid. 403.

Carlone made the choice of entering into the stipulation concerning the legitimacy of the F. B. I. surveillance based upon well-reasoned motives—to avoid the prejudicial effect of F. B. I. testimony as to why Carlone was being surveilled. *See* note 5 *supra.* Carlone attempts now, based upon the affidavit of Sorg, to gain a new trial and try a different approach to his defense. In order to do this, Carlone must meet the *Ward* standards; he has not.

The trial court is affirmed.

AFFIRMED.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT